IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 849 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DEVANG RAMESHBHAI SHAH - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR PM VYAS for Applicant(s) : 1,MR HIREN P VYAS for Applicant(s) : 1,MS SEJAL H VYAS for Applicant(s) : 1,
MS.HANSA PUNANI, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
MS RV ACHARYA for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 13/04/2006

ORAL JUDGMENT

Devang Rameshbhai Shah, the petitioner-original accused no.1 is before this Court being aggrieved by order dated 23rd November 2004 passed by the learned

Judicial Magistrate (First Class), Ankleshwar in Criminal Case No.1093 of 2002. The order is passed below Exh.40 – a Discharge Application.

Short facts giving rise to the present proceedings are that one, Jagdishbhai Patel, the complainant filed a complaint against three persons. Devang Rameshbhai Shah, Nehal B. Shah and Nikunj R. Shah, were accused nos.1, 2 and 3 respectively. Before filing the complaint notice was given on 10th January 2002 to all the aforesaid accused persons. Along with others two, Devang R. Shah, the present petitioner also thought it fit not to reply the said notice. It is thereafter, that the complainant was constrained to file the complaint dated 4th February 2002 making specific averments that Devang R. Shah was also one of the persons in charge of the affairs of the partnership firm and therefore, he is jointly and severally liable for the allegations made in the complaint. The petitioner, Devang R. Shah, may be on ill advice, did not bother to take any steps in the matter and only after almost one year filed Discharge Application in the year 2003 which came to be dismissed by order dated 23rd July 2003.

Against that order, Revision Application being Criminal

Revision Application No.121 of 2003 was filed before the learned District & Additional Sessions Judge, Bharuch, which too was rejected by order dated 10th March 2004.

2. The petitioner then filed second Discharge Application, with certain documents praying the same relief as was prayed in the first Application. The second Discharge Application is rejected by order dated 23rd November 2004, which order is under challenge in the present Revision Application.

3. Mr.H.P. Vyas, the learned advocate appearing for the petitioner vehemently contended that as is held by this Court in the matter of **Kartik Kirtibhai Parekh & another Vs. State of Gujarat & another** reported in 2005 (1) GLR 361, 'only bald assertion in the complaint should not weigh with the learned Judicial Magistrate (First Class), the learned Judge should consider the question of discharging the petitioner.' In this regard the learned advocate relied upon para 17 of the judgement which reads as under:

> “In the present case, except a bald statement, there is no allegation or averment in the complaint that both the petitioners were

concerned with the day to day business of the company or were aware about the issuance of the cheques in question."

4. Learned advocate did not take trouble to make a comparative study of the complaint filed in the matter of **Kartik Kirtibhai Parekh** (supra) and in the present case. There is bald assertion on the part of the learned advocate when he submitted that this particular decision is applicable to the facts of the present case without any comparative study of the facts of the case. The decision does not help the petitioner.

5. The learned advocate next relied upon a decision of the Hon'ble the Apex Court in the matter of **SMS Pharmaceuticals Ltd. Vs. Neeta Bhalla and another,** reported in 2005(5)CTC 65 Manupatra/SC/0622/ 2005, a xerox copy is made available by the learned advocate for perusal of the decision. The learned advocate submitted that in that case three questions were raised before the Hon'ble the Apex Court for consideration. The same are set out in para 1 of the judgement. The same are reproduced hereunder:

"(a) Whether for purposes of section 141 of the

Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfil the requirements of the said section and it is not necessary to specifically state in the complaint that the persons accused was in charge of, or responsible for, the conduct of the business of the company.

(b) whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(c) even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the Managing Directors of Joint Managing Director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against.”

The learned advocate submitted that these questions are answered by the Hon'ble the Apex Court in para 16 of the judgement which reads as under:

"In view of the above discussion, our answers to the questions posed in the Reference are as under:

(a) It is necessary to specifically aver in a complaint under section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of section 141 cannot be said to be satisfied.

(b) The answer to question posed in sub-para(b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of section 141 is that the persons sought to be made liable should be in charge of and responsible for the conduct of the business of

the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of section 141.”

Once again the learned advocate could not point out as to how this decision of the Hon'ble the Apex Court is applicable to the facts of the present case. Admittedly,

in the case before the Hon'ble the Apex Court the question of general importance was under consideration, particularly with reference to the 'Director of a company' and the 'Managing Director or Joint Managing Director of a company'. A decision cannot be made applicable until it is established that the facts of the case on hand and the facts of the case in which decision was rendered are similar.

6. The learned advocate next relied upon a decision of the Hon'ble the Apex Court in the matter of **Monaben Ketanbhai Shah & another Vs. State of Gujarat**, reported in 2005 (1) GLR 21. The learned advocate submitted that the Hon'ble the Apex Court has held that:

> "In the complaint there are no averments against th appellants except stating in the title that they are partners of the firm. Learned counsel for the respondents/ complainant contended that a copy of the partnership deed was also filed which would show that the appellants were active in the business. No such document was filed with the complaint or made part thereof. The filing of the partnership deed later is of no consequence for determining the point in issue.

> Section 141 does not make all partners liable for the offence. The criminal liability has been fastened on those, who at the time of the commission of the offence, was in-charge of and was responsible to the firm for the conduct of the business of the firm. These may be sleeping partners who are not required to take any part in the business of the firm; they may be ladies and others who may not know anything about the business of the firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction."

7. Once gain without taking trouble to appreciate that the case before the Hon'ble the Apex Court had similar facts as the case on had, he asserted that the decision of the Hon'ble the Apex Court is applicable to his case. The learned advocate did not take pain to take note or deliberately avoided to take note of the fact that in the case on hand a notice was issued by the complainant before filing the complaint and the petitioner, for the reasons best known to him did not bother to reply to that

notice. It is thereafter, that the complaint was filed and in that complaint specific averments were made that the petitioner is in charge of the affairs of the partnership firm, that the petitioner is jointly and severally liable for the act, constituting offence alleged in the complaint. The learned advocate could not point out any thing which will satisfy the Court on the point as to why the first Discharge Application was filed, only after lapse of one year. It can be culled out from the conduct of the petitioner that the proceedings filed against him were taken lightly. He was knowingly/ unknowingly taking action only when it came to his neck. After the Discharge Application was rejected on 23.07.2003 he filed Revision Application being Criminal Revision Application No.121 of 2003. That Revision Application was also rejected on 10th March 2004. The petitioner then realised the difficulties and hence filed second Discharge Application. The learned Judicial Magistrate (First Class), Ankleshwar has rightly observed that these documents should have been filed at the initial stage. It is clear from the conduct of the petitioner-accused no.1 that he was never serious about the Court proceedings and he wanted to tire out the complainant by resorting to the technicalities/ niceties of law.

8. In such fact and situation discretion, cannot be and must not be exercised in favour of the petitioner.

9. The learned advocate appearing for the complainant-opponent no.2 herein Ms.Acharya relied upon a decision of the Hon'ble the Apex Court in the matter of **S.V. Mazumdar and others Vs. Gujarat State Fertilizer Co. Ltd. & another**, reported in 2005 SAR (Criminal) 567 (Supreme Court), wherein the Hon'ble the Apex Court was pleased to hold that, 'where there is a complaint filed for the offence punishable under section 138 of the Negotiable Instruments Act, 1881, the prayer for dropping proceedings, on the ground that allegation in the complaint would not constitute a foundation for action in terms of section 141, such questions have to be adjudicated at trial.' The Hon'ble the Apex Court was pleased to observe that, whether a person is in charge of, or is responsible to, company for conduct of its business is to be adjudicated on the basis of the material to be placed by the parties. The Hon'ble the Apex Court further observed that the question as to whether requirements for 'application of deeming provision' exist or not is again a matter for adjudication during trial and similarly whether

allegations contained are sufficient to attract culpability is a matter to be adjudicated at trial. The Hon'ble the Apex Court was pleased to hold that, 'refusal to drop proceeding at threshold is justified.'

The decision of the Hon'ble the Apex Court in the matter of **S.V. Mazumdar and others** (supra) is applicable with full force to the facts of the present case, particularly when it is the petitioner-accused no.1 who did not bother to reply to notice given by the complainant, who did not bother to move the Court for a long one year. Later on the Discharge Application was moved but the without supporting documents. He then filed second Discharge Application with documents only after the order of rejection of the first Discharge Application was confirmed in Revision Application.

All this conduct shows the mind set of the petitioner-accused no.1. This Court is, therefore, of the considered opinion that this Criminal Revision Application has no substance and the same is dismissed. Rule is discharged. Interim relief is vacated. No order as to costs.

(RAVI R. TRIPATHI, J.)

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